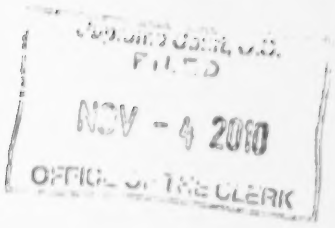
No. 10-406



IN THE
SUPREME COURT OF THE UNITED STATES

LOUISE ROOT,

Petitioner

v.

COUNTY OF FAIRFAX, PAMEAL SCHMOLL, MICHEL BODART, SUE GILBERT & JOHN COLWELL

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The Case Presents A Novel Question Concerning Due Process Because The Proceeding In Which Root Was Purportedly Afforded Due Process Was Nullified *Ab Initio*

1. The County contends that:

> Root was given the opportunity to be heard, was in fact heard, and was able to present her objections to the seizure of her animals pursuant to Va. Code Ann. § 3.1-796.115 . . . .

Brief In Opposition To Petition For Writ Of Certiorari (hereinafter "Opp.") 5.

The County then spends the next three pages of its Opposition (pages 6-8) detailing the procedures followed by the general district court, concluding that these procedures afforded Root "all of the process she was due under the Fourteenth Amendment." Opp. 8.

This argument only serves to emphasize the reason this Court should grant Root's petition. If the process in the general district court was all the process Root received, she did not receive the process she was due under the Fourteenth Amendment because of the subsequent procedures established by Virginia law, *i.e.*, the right to appeal for a trial *de novo* in the circuit court (which annuls the proceedings, including any orders, in the general district court).

The provision under which the proceedings against Root were brought, Virginia Code § 3.1-796.115(C),

requires that the "procedure for appeal and trial shall be the same as provided by law for misdemeanors." The provisions concerning appeal and trial for misdemeanors are Virginia Code § 16.1-132 and Virginia Code § 16.1-136. Virginia Code § 16.1-132 provides:

> Any person convicted in a district court of an offense not felonious shall have the right, at any time within ten days from such conviction, and whether or not such conviction was upon a plea of guilty, to appeal to the circuit court.

Virginia Code § 16.1-136 provides in pertinent part:

> Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and . . . the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit court.

In *Baker v. Elmendorf*, 271 Va. 474, 628 S.E.2d 358 (2006), the Virginia Supreme Court summarized these statutes as follows: the "appeal de novo negates the prior proceeding . . . ." 271 Va. at 479.

To support its position that the process Root received in the general district court was all the process she was due, the County argues that Virginia law does not "hold that upon an appeal to a circuit court from a general district court the entire proceedings in the general district court are a legal

nullity." Opp. 9. According to the County, the case law holds only that "the entire proceedings in the general district court remain – only the judgment appealed from is annulled by the appeal." Opp. 9.

While not an accurate summary of the well-established case law (as discussed *infra*), even if it were accurate, the County's argument effectively concedes that Root was deprived of her property without due process because the judgment of the general district court was annulled. That is, there being no judgment authorizing the County to retain Root's property, the County was bound to return the property. But it is undisputed that it failed to do so. Accordingly, by its own admission, the County has deprived Root of her property without due process as it has retained her property following the annulment of the judgment, without any further process.

It is because of this unique issue -- the annulment of the judgment without any further process -- not decided by any of this Court's previous due process decisions,[1] that this Court should grant the petition -- to determine whether failure to return property after the judgment in the statutorily mandated proceeding

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[1] *United States v. Parcel of Rumson, N. J., Land*, 507 U.S. 111, 126 (1993), noted that, "'whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited' (citation omitted)," "'*title is not perfected until judicial condemnation* . . . .'" 507 U.S. at 126 (citation omitted)(emphasis in original). Further, until the Government wins a judgment of forfeiture, "someone else owns the property." 507 U.S. at 127.

has been annulled is a violation of the Fourteenth Amendment's due process clause.

2. The state case law does more than merely establish that only the judgment appealed from is annulled by the appeal.

As discussed, *supra*, Virginia Code § 16.1-132 and Virginia Code § 16.1-136 provide for an appeal to the circuit court, which is heard *de novo*. Further, as noted, *supra*, the Virginia Supreme Court held that the "appeal de novo negates the prior proceeding . . . ." *Baker*, *supra*, 271 Va. at 479. Moreover, *Baker* reiterated the Court's prior decisions in *Santen v. Tuthill*, 265 Va. 492, 578 S.E.2d 788 (2003) and *Gaskill v. Commonwealth*, 206 Va. 486, 144 S.E.2d 293 (1965).

In *Gaskill*, the Court held that the appeal to circuit court "annuls the judgment of the inferior tribunal *as completely as if there had been no previous* ***trial***." 206 Va. at 490 (emphasis added). Thus, *Gaskill* made clear that, when the Court spoke of annulling the judgment, it included nullification of the trial, *i.e.*, the entire proceeding, as if the entire general district court proceeding had not happened. See also *Gemmell v. Svea Fire, Etc., Ins. Co.*, 166 Va. 95, 99, 184 S.E. 457, ____ (1936)(when appeal is taken, the "cause is considered as still pending").

Similarly, in *Santen*, the Court held that "an appeal under Code § 16.1-132 'annuls or wipes out' a guilty plea entered in the district court . . . ." 265 Va. at 497. Thus, again, not only is the judgment

annulled, but the *proceeding* itself is annulled *ab initio* because the proceeding was the guilty plea.

The County asserts that, in *Baker*:

> the Virginia Supreme Court held that "[w]henever a defendant exercises his rights under Code § 16.1-132 and a conviction in general district court is appealed, *the fact of that conviction is not admissible in the appeal or in a subsequent civil proceeding*." [*Baker*] at 479, 628 S.E.2d at 362. (emphasis added).

Opp. 9-10.[2]

While not an inaccurate quotation from *Baker*, the holding of *Baker* was not limited to the "fact of" the conviction. First, as noted above, *Baker* more broadly held that an "appeal de novo negates the prior *proceeding* . . . ." 271 Va. at 479 (emphasis added). Second, the context within which the quotation relied upon by the County was made was *Baker*'s rejection of:

> the Elmendorfs' remaining argument that, regardless of these cases and statutory changes, *Ricketts* [v. *v. J.G. McCrory Co.* 138 Va. 548, 121 S.E. 916 (1924)] should still control this case because an action for malicious prosecution requires an examination of the judicial history of the criminal charge.

271 Va. at 480.

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[2] The quotation is actually at 271 Va. at 480.

The Virginia Supreme Court responded to that narrow argument by stating:

> Whenever a defendant exercises his rights under Code § 16.1-132 and a conviction in general district court is appealed, the fact of that conviction is not admissible in the appeal or in a subsequent civil proceeding.

271 Va. at 480.

Thus, consistent with previous holdings of the Virginia Supreme Court, *Baker* did not limit its holding to whether the fact of a conviction in the general district court, which is appealed for a trial *de novo*, is admissible in the appeal or in a subsequent civil proceeding. Rather, *Baker* made clear that the "appeal de novo negates the prior proceeding . . . ." 271 Va. at 479.

3. The County contends that, when Root appealed the February 22, 2006, order to the circuit court:

> she had yet another opportunity to be heard and was, in fact, present with counsel and heard on July 6, 2006, after which they circuit court orally ordered "'that the animals be sold by the local governing body, humanely destroyed or disposed of by sale or gift . . . .'"

Opp. 8-9.

The County omits the critical facts that there was no final judgment in the circuit court (so that the

proceeding was not complete) and that the County (through the Commonwealth Attorney) non-suited the case in the circuit court, so that, in effect, there was *no* proceeding in the circuit court. See *e.g.*, *Sheets v. Castle,* 263 Va 407, 413, 559 S.E.2d 616, ___ (2002)(nonsuit "does not involve a decision on the merits, rather, it 'simply [puts] an end to the present action'"). In light of the non-suit, Root effectively received no meaningful process whatever in the circuit court, and was denied her right to a jury trial.

4. The County asserts:

> [J]ust as testimony is not "wiped out" and is admissible in a *de novo* appeal to circuit court, the fact that Root had notice and opportunity to be heard, and was in fact heard on December 22, 2004, in the general district court is also not "wiped out" by her appeal to the circuit court.

Opp. 10.

The County relies upon the following statement in *Santen, supra*:

> We draw a distinction between a guilty plea, which forms the basis of a district court's judgment, and a defendant's statements made while testifying before the district court. That testimony, unlike a guilty plea, is not "wiped out" by an appeal and is, therefore, admissible in the subsequent trial of the case.

265 Va. at 497.

But the fact that Root had notice and opportunity to be heard, and was in fact heard on December 22, 2004, was, analogous to a guilty plea, what "form[ed] the basis of [the] district court's judgment . . . ." 265 Va. at 497. Indeed, had Root not had notice and opportunity to be heard, there could have been no judgment. Thus, under *Santen*, as well as *Baker* and *Gaskill*, the fact that Root had notice and opportunity to be heard, and was in fact heard on December 22, 2004, was "wiped out" by the appeal to the circuit court.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

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